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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

ROBERT L. WEIS II,

Plaintiff,

vs.

ACCIDENTAL DEATH AND  
DISMEMBERMENT BENEFIT PLAN OF  
KAISER FOUNDATION HEALTH PLAN  
INC.,

Defendant.

Case No. C 05-05159 EDL

**PLAINTIFF'S OPPOSITION TO  
DEFENDANT'S CROSS-MOTION FOR  
SUMMARY JUDGMENT AND REPLY  
IN SUPPORT OF PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT**

Date: August 1, 2006

Time: 9:00 a.m.

Courtroom: E, 15th Floor

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1     **I.     INTRODUCTION.**

2             Plaintiff Robert Weis accidentally jammed his thumb flush into his left eye and lost all  
3 vision in the eye. Although emergency surgery temporarily restored his vision, Mr. Weis  
4 permanently lost all vision in his left eye after complications developed. Mr. Weis requested  
5 accidental dismemberment benefits under the terms of Defendant Accidental Death and  
6 Dismemberment Benefit Plan of Kaiser Foundation Health Plan Inc. (“Plan”). AIG denied his  
7 claim and Mr. Weis sued.

8             On May 23, 2006, Mr. Weis moved for summary judgment on his claim for benefits for  
9 the total loss of sight in one eye under the terms of the Plan. Mr. Weis argued that AIG should  
10 have applied California’s “efficient proximate cause” rule to his claim and found he was entitled  
11 to benefits. *See* Docket No. 15, Plaintiff’s Motion for Summary Judgment (“P’s Opening  
12 Brief”).

13             Defendant Plan, in its Cross Motion for Summary Judgment and Opposition to Plaintiff’s  
14 Motion for Summary Judgment (Docket No. 17) (“Def’s Brief”), turns a blind eye to several of  
15 Plaintiff’s arguments. First, Defendant does not contest that the efficient proximate cause rule  
16 was incorporated into the AIG policy insuring the Plan (“Policy”). Second, Defendant does not  
17 seriously contest that under the efficient proximate cause rule, Mr. Weis is entitled to benefits.  
18 For these reasons alone, Mr. Weis should prevail on his motion for summary judgment.

19             Having abandoned any argument to prevail under the efficient proximate cause rule,  
20 Defendant attempts to confuse the issues by arguing that the efficient proximate cause rule is  
21 preempted by ERISA and therefore a federal “predominant cause” standard applies. Defendant is  
22 wrong for three reasons – (1) the Policy incorporates California law, including the efficient  
23 proximate cause rule; (2) the efficient proximate cause rule is saved from ERISA preemption;  
24 and (3) the governing plan document, the Summary Plan Description, does not include  
25 exclusionary language that would trigger the predominant cause test.

26             Defendant further attempts to obscure the Court’s task by suggesting that the predominant  
27 cause test is the same as the efficient proximate cause rule. Defendant is wrong again – multiple  
28 court decisions demonstrate that the efficient proximate cause rule is more favorable to insureds.

1 Finally, Defendant attempts to argue that its decision was correct under the predominant  
2 cause standard. Defendant fails once again because (1) only the efficient proximate cause  
3 standard applies, and (2) undisputed facts demonstrate that Mr. Weis is entitled to benefits under  
4 any standard of causation.

5 For these reasons, Plaintiff requests that the Court grant his Motion and award him  
6 accidental dismemberment benefits for his total loss of vision in his left eye – a serious injury  
7 that has robbed him of depth perception.

## 8 **II. STATEMENT OF FACTS.**

9 The facts underlying this claim are set forth in Plaintiff's Opening Brief and in the  
10 parties' Joint Case Management Statement ("JCMS"), Docket No. 9. Plaintiff hereby  
11 incorporates those statements of facts. Defendant's Statement of Facts in its own Opening Brief  
12 ("Def's Brief"), however, leaves out several important facts and makes assertions that are  
13 inconsistent with the stipulated facts in the JCMS.

14 First, Defendant ignores the serious nature of Mr. Weis's accident which led to his claim  
15 for benefits for total loss of sight in one eye. Mr. Weis tripped and fell in his home on April 8,  
16 2001. He put out his left hand to break his fall, and his left eye came into full contact with his  
17 thumb, jamming the thumb several inches into his eye socket. JCMS at 2:11-12. He saw a flash  
18 of light on impact, and the left side of his vision went black. *Id.* at 2:12-13. Defendant,  
19 however, repeatedly downplays the violence of the accident by acknowledging only that Mr.  
20 Weis "poked himself in his eye," Def's Brief at 1:20-21, and even characterizing the event as a  
21 "mere poke in the eye." Def's Brief at 2:5. Jamming one's thumb several inches into the eye  
22 socket is not a "mere" poke in the eye. Defendant's statement of facts mischaracterizes the  
23 accident.

24 Defendant also incorrectly conflates Mr. Weis's total loss of sight in his left eye with his  
25 retinal detachment, suggesting that if the retinal detachment began before the accident, the loss of  
26 sight must have already occurred as well. *See* Def's Brief at 3:19-20 (characterizing the  
27 causation issue to be decided as "the medical question of what caused Weis's severe retinal  
28 detachment"). In making this false equation, Defendant ignores important stipulated facts: Mr.

Weis had vision in his left eye before the accident, JCMS 2:19-20, and immediately following the accident he had none, *id.* at 2:20-21. Defendant also ignores the stipulated fact that surgery to repair the retina temporarily restored Mr. Weis's vision, and it was not until complications developed following surgery that Mr. Weis's permanent loss of vision occurred. *Id.* at 2:21-26. Given the undisputed fact that the permanent loss of sight did not occur until complications developed from the surgery, it is clear that the retinal detachment and the loss of sight are not the same thing.

Defendant acknowledged and stipulated to the above facts in the JCMS. Its attempt to distort the story of Mr. Weis's serious eye injury in its Opening Brief should not distract the Court from the true facts underlying the claim.

**III. THE EFFICIENT PROXIMATE CAUSE RULE GOVERNS MR. WEIS'S CLAIM. THE PREDOMINANT CAUSE RULE SET FORTH IN *McCLURE* DOES NOT APPLY HERE.**

The efficient proximate cause rule arising from Calif. Ins. Code § 530 is the applicable standard of causation for Mr. Weis's accidental dismemberment claim for three independent reasons. First, the Policy incorporates California law, including the efficient proximate cause rule. Second, the efficient proximate cause rule is a state insurance law saved from ERISA preemption. Third, the alternative predominant cause rule does not apply here because the governing plan document, the Summary Plan Description, does not restrict covered risks to losses caused by accidents "directly and independently of all other causes."

**A. Defendant Concedes that the Policy Incorporates California Law.**

In his Opening Brief, Plaintiff argued that the efficient proximate cause rule applies to his claim because the Policy provides that it is automatically "amended to conform to the minimum requirements" of the statutes for the state where the Policy is delivered (in this case, California). P's Opening Brief at 10. Defendant's Opening Brief does not dispute this point.

Defendant, however, may nevertheless cite the following footnote from the *Henry v. Home Ins. Co.*, 907 F.Supp. 1392, 1398 fn. 7 (C.D. Cal. 1995) decision in its Reply Brief:

Henry insists that the California proximate cause test applies directly based on language of the Plan, which states that the "terms of this policy in conflict with the laws of the state where it is delivered are amended to conform to such laws." However, the Plan at issue is

1 governed by ERISA, and as such, federal law applies, not California law.

2 This footnote from *Henry* is incorrect because it contradicts Ninth Circuit law.

3 In *Wang Laboratories, Inc. v. Kagan*, 990 F.2d 1126, 1128-29 (9th Cir.1993), the Ninth  
4 Circuit held that “[w]here a choice of law is made by an ERISA contract, it should be followed,  
5 if not unreasonable or fundamentally unfair.” (Quotation omitted.) In *Wang*, the “ERISA plan  
6 stated that the rights and obligations of the parties were to be ‘governed by the law of  
7 Massachusetts, and all questions pertaining to the validity and construction of such rights and  
8 obligations shall be determined in accordance with such law.’” *Id.* at 1128. The Ninth Circuit  
9 held that this choice of law provision was valid and required application of the Massachusetts  
10 statute of limitations. *Id.* at 1129. *See also Moskowitz v. Everen Capital Corp.*, 2005 WL  
11 1910941, \*2 (N.D. Cal. 2005) (Enforcing Illinois choice of law provision in ERISA plan).

12 The *Henry* court mistakenly concluded that the plan’s incorporation of California law was  
13 void because of ERISA preemption. In *Buce v. Allianz Life Ins. Co.*, 247 F.3d 1133, 1148 (11th  
14 Cir. 2001), the Eleventh Circuit explained why this argument is wrong:

15 [W]hen private contracting parties formulate a choice-of-law provision that, with a view  
16 to defining liability, incorporates state legal doctrines, those doctrines are not emanations  
17 of state authority, they are simply a convenient shorthand for what the private contracting  
18 parties wish to agree to. The pertinent question to be addressed with respect to such a  
19 choice-of-law provision is, therefore, not a question of the possible irreconcilability of  
20 directives issuing from two different sovereignties - one federal and one state. The  
21 pertinent question, in short, is not one of “preemption” in the conventional sense of that  
22 term. The pertinent question is whether the principles of liability agreed upon by the  
23 parties are inconsistent with the language of ERISA or the policies that inform that statute  
24 and animate the common law of the statute.

21 In *Buce*, the plan stated that it “is to be interpreted in accordance with the laws of the State of  
22 Georgia.” *Id.* at 1147. The Eleventh Circuit therefore applied the Georgia “accidental means”  
23 doctrine to an ERISA benefit claim because the state law was not inconsistent with the terms or  
24 policies of ERISA. *Id.* at 1149. *See also Harris v. The Epoch Group, L.C.*, 357 F.3d 822, 825  
25 (8th Cir. 2004) (“Although parties may not agree an ERISA plan shall be construed according to  
26 the principles of state law rather than principles of the federal common law, the appellees have  
27 not brought to our attention any principle which prohibits parties from borrowing from state law  
28 when drafting the substantive terms of an ERISA-governed benefit plan”) (citation omitted);



1 *Jenkins v. Montgomery Industries*, 77 F.3d 740, 743 (4th Cir. 1996) (insurance policy calling for  
 2 construction of its provisions “according to laws of the State of South Carolina” requires  
 3 application of state case law relating to interpretation of insurance exclusion); *Plumb v. Fluid*  
 4 *Pump Services*, 124 F.3d 849, 861 (7th Cir. 1997) (same with respect to application of Illinois  
 5 state law).

6 In the present case, the Policy provision amending the Policy to conform to California  
 7 statutes is not unreasonable or fundamentally unfair. Since the Plan provides benefits to  
 8 California residents, it makes sense that the Policy should conform to California law. Moreover,  
 9 the efficient proximate cause rule is not inconsistent with the terms or policies of ERISA. No  
 10 provision of the ERISA statute addresses the level of causation required for liability under  
 11 accident insurance plans. Nor is it fundamentally unfair to allocate greater risk to an insurer  
 12 where multiple causes contribute to a loss.

13 The Plan sponsor, Kaiser Foundation Health Plan, and AIG agreed to an insurance policy  
 14 contract that incorporated California law by reference. Since ERISA does not “mandate what  
 15 kind of benefits employers must provide if they choose to have such a plan,” *Lockheed Corp. v.*  
 16 *Spink*, 517 U.S. 882, 887 (1996), this choice was simply a matter of plan design, and does not  
 17 create a conflict between state and federal regulation of the plan. Therefore, the Court should  
 18 uphold the contract provision amending the Policy to conform to California law.

19 **B. The Efficient Proximate Cause Rule Is Saved From ERISA Preemption.**

20 In his Opening Brief, Plaintiff argued that the efficient proximate cause rule also governs  
 21 his claim because it is a state insurance law saved from ERISA preemption. P’s Opening Brief at  
 22 11. Defendant agrees that the applicable test for ERISA preemption is set forth in *Kentucky*  
 23 *Association of Health Plans, Inc. v. Miller*, 538 U.S. 329, 341-42 (2003). Defs’ Brief at 15:22-  
 24 16:4. In *Kentucky Association*, the Supreme Court revised the standard for determining whether  
 25 a state law falls within ERISA’s Savings Clause. The Court held that, “for a state law to be  
 26 deemed a ‘law which regulates insurance’ under § 1144(b)(2)(A), it must satisfy two  
 27 requirements. First, the state law must be specifically directed toward entities engaged in  
 28 insurance. Second, . . . the state law must substantially affect the risk pooling arrangement

1 between the insurer and the insured.” *Kentucky Association*, 538 U.S. at 341-42 (citations  
2 omitted).

3 Defendant does not dispute the second prong of the *Kentucky Association* test, i.e., that  
4 the efficient proximate cause rule substantially affects the risk pooling arrangement. Defendant,  
5 however, asserts that California Insurance Code § 530 is not saved from ERISA preemption  
6 because it is a general rule of state law rather than a law which regulates insurance. Def’s Brief  
7 at 17:4-23. The Supreme Court rejected a similar argument in *Unum Life Ins. Co. v. Ward*, 526  
8 U.S. 358 (1999), a case that Defendant conspicuously avoids citing.

9 In *Unum Life*, the Supreme Court held that California’s notice-prejudice rule is a law  
10 which regulates insurance, and is therefore saved from ERISA preemption. The Court stated that  
11 the notice-prejudice rule “by its very terms, is directed specifically at the insurance industry and  
12 is applicable only to insurance contracts.” *Id.* at 368 (quotation omitted). The *Unum Life* Court  
13 further observed “Our survey of California law reveals no cases where the state courts apply the  
14 notice-prejudice rule as such outside the insurance area. Nor is this surprising, given that the rule  
15 is stated in terms of prejudice to an ‘insurer’ resulting from untimeliness of notice.” *Id.* at 368  
16 (quotation omitted).

17 The Savings Clause analysis is the same for the efficient proximate cause rule, which is  
18 based on Calif. Ins. Code § 530. Ins. Code § 530 is stated in terms of the liability of an “insurer”  
19 and is applicable only to insurance contracts. In addition, a survey of California law by  
20 Plaintiff’s counsel reveals no cases where the state courts apply the efficient proximate cause rule  
21 as such outside of the insurance area. Second Declaration of Daniel Feinberg in Support of  
22 Plaintiff’s Motion for Summary Judgment (“Second Feinberg Dec.”) at ¶ 4. There are over 50  
23 California cases (reported and unreported) using the phrase “efficient proximate cause,” and all  
24 of these cases arise from claims for insurance coverage. *Id.*

25 In *Unum Life*, Unum further argued “that the notice-prejudice rule is merely an industry-  
26 specific application of the general principle that disproportionate forfeiture should be avoided in  
27 the enforcement of contracts” and therefore is not truly an insurance regulation. 526 U.S. at 368  
28 (quotation omitted). The Supreme Court rejected this argument: “It is no doubt true that diverse

1 California decisions bear out the maxim that ‘law abhors a forfeiture’ and that the notice-  
 2 prejudice rule is an application of that maxim. But it is an application of a special order, a rule  
 3 mandatory for insurance contracts, not a principle a court may plially employ when the  
 4 circumstances so warrant.” *Id.* at 370.

5 Defendant’s Savings Clause argument echoes Unum’s failed argument in *Unum Life*:  
 6 Defendant asserts that the efficient proximate cause rule is merely a codification of “the common  
 7 law proximate cause standard . . . for the interpretation of insurance contracts.” Defs’ Brief at  
 8 17:14-16. Defendant is wrong for two reasons.

9 First, the efficient proximate cause rule is a special application of “proximate cause.” As  
 10 discussed below in Section III.C.2, there are numerous proximate cause tests. Calif. Ins. Code §  
 11 530, however, mandates that insurance contracts use a particular standard of causation for  
 12 determining liability. The efficient proximate cause rule is not used by California courts outside  
 13 of the insurance context. Second Feinberg Dec. at ¶ 4.

14 Second, although the term “proximate cause” is also used in tort law, the term has a  
 15 different meaning in the insurance context: “proximate cause has a different meaning in  
 16 insurance cases than it has in tort cases. In tort cases the rules of proximate cause are applied for  
 17 the single purpose of fixing culpability, . . . [but] in insurance cases the concern is not with the  
 18 question of culpability or why the injury occurred, but only with the nature of the injury and how  
 19 it happened.” Annotation, *Injury or Disability Resulting From Medical Treatment For Accident*  
 20 *As Proximately Caused By Original Accident Within Coverage of Accident or Disability*  
 21 *Insurance*, 25 A.L.R.3d 1386 (1993).

22 Defendant also argues Calif. Ins. Code § 530 is a general rule of state law because it was  
 23 originally enacted in 1872 as part of the Civil Code, and did not become part of the Insurance  
 24 Code until 1935. Defs’ Brief at 17:9-14. Defendant’s argument is disingenuous – California did  
 25 not have an Insurance Code until 1935. Prior to 1935, all California insurance laws were part of  
 26 the Civil Code. *See* Historical and Statutory Notes, West’s Ann. Cal. Civ. Code §2626, attached  
 27 to Second Feinberg Dec. as Exhibit 4. In 1935, Calif. Civil Code §§ 2531 - 2679 were repealed  
 28 and re-enacted as the new Insurance Code. *Id.* A survey of the statutes moved from the Civil

Code to the Insurance Code demonstrates the absurdity of Defendant's argument. The Insurance Code sections adopted in 1935 include the definition of an insurable interest (Ins. Code §§ 280 - 287), rules governing the allocation of risk and indemnity (Ins. Code §§ 2030 - 2056), and restrictions on the payment of life insurance benefits (Ins. Code §§ 10170 - 10172). Obviously, all of these statutes regulate insurance despite the fact that they were originally enacted as part of the Civil Code.

Finally, Defendant, relying on case law that pre-dates the Supreme Court's decisions in *Unum Life* and *Kentucky Association*, argues that the efficient proximate cause rule is preempted as a general law of contract interpretation. Defs' Brief at 16:14-17:2. Defendant's reliance on these superseded cases is mistaken for two reasons.

First, Calif. Ins. Code § 530 is *not* a law of contract interpretation. Ins. Code § 530 states a mandatory requirement for allocating risk in insurance policies. The Section states the minimum permissible standard of causation for an insurer's liability, rather than a rule of interpretation. In this regard, the efficient proximate cause rule is more like the mandated-benefit statute upheld by the Supreme Court in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), than the general rules of contract interpretation applied to insurance policies, such as *contra proferentem*, held preempted in cases cited by Defendant. *See, e.g., Serrato v. John Hancock Life Ins. Co.*, 31 F.3d 882, 886 (9th Cir. 1994) (holding that *contra proferentem* is not saved from ERISA preemption).

Second, the Supreme Court announced in *Kentucky Association* that it was "mak[ing] a clean break from the McCarran-Ferguson factors" for determining the reach of ERISA's Savings Clause. 538 U.S. at 341. Due to the Supreme Court's revised analysis of the Savings Clause in *Kentucky Association*, Plaintiff submits that the holdings in the line of cases represented by *Kanne v. Connecticut Gen. Life Ins. Co.*, 867 F.2d 489 (9th Cir. 1988), and *Security Life Ins. Co. v. Meyling*, 146 F.3d 1184 (9th Cir. 1998), are limited.<sup>1</sup>

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<sup>1</sup> In contrast, in making this "clean break" with the past, *Kentucky Association*, 538 U.S. at 341, the Court characterized its prior rulings in *Metropolitan Life*, *Unum Life*, and *Rush Prudential HMO, Inc., v. Moran*, 536 U.S. 355 (2002), as being consistent with the new standard

1 In *Kentucky Association*, the Supreme Court expanded the scope of ERISA’s Savings  
 2 Clause by eliminating the McCarran-Ferguson factors as criteria for deciding whether a state law  
 3 regulated insurance. Although the Ninth Circuit stated that prior Savings Clause cases are “well  
 4 worth considering” following *Kentucky Association* and *Unum Life*, the Ninth Circuit also stated  
 5 that *Unum Life* “took a much more generous approach than [prior case law] in analyzing whether  
 6 a law was specifically directed at insurance.” *Elliot v. Fortis Benefits Ins. Co.*, 337 F.3d 1138,  
 7 1143, 1145 (9th Cir. 2003).<sup>2</sup> Thus, in *Elliot*, the Ninth Circuit stated that a Montana statute  
 8 directed at insurance company claims processing “probably meets the first requirement of the  
 9 [*Kentucky Association*] test, since the [statute] ‘by its very terms’ is directed at insurance and  
 10 contains provisions applicable only to insurance companies.” *Id.* at 1145.

11 Because the efficient proximate cause rule is specifically directed at entities engaged in  
 12 insurance, and substantially affects the risk-pooling arrangement between insurer and insured, it  
 13 is saved from preemption by ERISA’s Savings Clause and should be applied in Mr. Weis’s case.

#### 14 **C. The McClure Test Does Not Apply to Mr. Weis’s Claim.**

15 Defendant argues that the causation standard articulated in *McClure v. Life Ins. Co. Of N.*  
 16 *Am.*, 84 F.3d 1129 (9th Cir. 1996), applies to Mr. Weis’s claim. Defs’ Brief at 9:22 - 11:17. In  
 17 *McClure*, the Ninth Circuit held that when an accident insurance policy contains exclusionary  
 18 language, such as the requirement in the AIG Policy that a loss result from a covered risk  
 19 “directly and independently of all other causes,” the standard of causation depends on whether  
 20 the exclusionary language is conspicuous to the insured:

21 if the exclusionary language here in question is conspicuous it would bar recovery  
 22 if a preexisting condition substantially contributed to the disability. This could  
 23 result in a denial of recovery even though the claimed injury was the predominant  
 24 or proximate cause of the disability. On the other hand, we hold that if the  
 25 language is inconspicuous, a policy holder reasonably would expect coverage if  
 26 the accident were the predominant or proximate cause of the disability.

27 \_\_\_\_\_  
 28 announced. *Kentucky Association*, 538 U.S. at 338-41.

<sup>2</sup> Notably, *Elliot* does not include any of the Savings Clause cases relied on by Defendant  
 among the prior cases that are “well worth considering.”

84 F.3d at 1136. Defendant argues both that (1) the second prong of the *McClure* test applies to Mr. Weis's claim, Def's Brief at 10:6-24, and (2) that it is equivalent to the California "efficient proximate cause" test, Def's Brief at 11:14. Defendant is wrong on both counts.<sup>3</sup>

1. The SPD Does Not Contain Exclusionary Language to Trigger the *McClure* Test.

The *McClure* test does not apply here because the Court's holding only applies where the operative plan document contains exclusionary language, such as "directly and independently." Here, the governing plan document does not contain that exclusion at all.

Defendant admits in its Opening Brief that Mr. Weis did not receive the Policy underlying the Plan before submitting his claim. Def's Brief at 3:8-10. Instead, he received only the Summary Plan Description ("SPD"). *Id.* The SPD does not contain the same standard of causation as the Policy. The SPD states only that "Accidental Death and Dismemberment benefits are not payable for death and dismemberment due to . . . most natural illnesses or diseases, self-inflicted injury or suicide, participation in a felony, and declared or undeclared acts of war or armed aggression." Second Feinberg Dec., Exhibit 3 at SPD 36. The Policy's requirement that a loss result "directly and independently of all other causes" from an accident, POL 007, is absent from the SPD. Therefore, the language required to trigger *McClure*'s two-part analysis does not appear in the SPD.

Where an SPD and a governing plan document conflict, participants may enforce whichever document is more favorable to them. In *Bergt v. Retirement Plan for Pilots Employed by Markair, Inc.*, 293 F.3d 1139, 1145 (9th Cir. 2002), the Ninth Circuit followed holdings by the Second, Sixth, Tenth and Eleventh Circuits, and ruled that "it would be unfair to have employees bear the burden of a conflicting SPD [Summary Plan Description] and plan master

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<sup>3</sup> Defendant also asserts that Mr. Weis "incorrectly characterized *McClure* as being decided under Nevada state law." Defs' Brief at 10, fn. 1. Defendant did not cite to any page of Plaintiff's Opening Brief for this proposition because Plaintiff made no such argument. Instead, Plaintiff stated that the Ninth Circuit adopted the *McClure* causation test as a matter of "federal common law" and "did not consider California's efficient proximate cause rule because the case arose in Nevada." P's Opening Brief at 11, fn. 4.



document and, thus . . . [the Court will enforce] the provision *more favorable* to the employee. . . ” (Emphasis in original.) In this case, the Plan Summary is more favorable to Mr. Weis and he is entitled to enforce its terms.

Moreover, the SPD’s exclusion of coverage for losses “due to . . . *most* natural illnesses or diseases” (SPD 36; emphasis added) is vague and ambiguous, since it means that losses due to *some* natural illnesses or diseases are covered, but leaves Plan participants, such as Mr. Weis, in the dark as to which losses due to these causes will be covered. As stated in Plaintiff’s Opening Brief, any ambiguity is construed in favor of providing coverage under the doctrine of contra proferentem. *Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534, 539-40 (9th Cir. 1990).

Because the “directly and independently” language that triggers the applicability of the *McClure* test does not appear in the SPD and Mr. Weis may enforce the SPD over the Policy, the *McClure* causation test is inapplicable. As discussed above, the efficient proximate cause rule arising from Calif. Ins. Code § 530 governs Mr. Weis’s claim.

## 2. *McClure*’s “Predominant Cause” Test is Not the Same as the Efficient Proximate Cause Test.

Defendant asserts that the predominant cause test set forth in *McClure*, 84 F.3d at 1135, is the same as the efficient proximate cause rule described in *Brooks v. Metropolitan Life Ins. Co.*, 27 Cal. 2d 305, 309-10, 163 P.2d 689, 691 (1945). Defs’ Brief at 11:8-17. A comparison of the judicial formulations of the two proximate cause standards shows that this is not true.

In *McClure*, the Ninth Circuit adopted the predominant cause test stated in *Henry v. Home Ins. Co.*, 907 F.Supp. 1392, 1398 (C.D. Cal. 1995), “requiring the plaintiff to show that the accident was the predominant, as opposed to remote, cause of the injury.” 84 F.3d at 1135. The *Henry* court, in turn, recognized that California courts apply a *different* proximate cause test, but chose to adopt another standard as a matter of federal common law. 907 F.Supp. at 1398 (discussing *Slobojan v. Western Travelers Life Ins. Co.*, 70 Cal. 2d 432, 443, 74 Cal. Rptr. 895, 902 (1969)).<sup>4</sup>

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<sup>4</sup> As shown in Sections III A and B, above, the *Henry* court was mistaken in not following California insurance law.

1 The California efficient proximate cause rule is more liberal than the predominant cause  
2 rule because it sets forth two alternative tests:

3 the presence of pre-existing disease or infirmity will not relieve the insurer from  
4 liability if the accident is the proximate cause of death; and that recovery may be had  
5 even though a diseased or infirm condition appears to actually contribute to cause the  
6 death if the accident sets in progress the chain of events leading directly to death, or if  
7 it is the prime or moving cause.

8 *Brooks*, 27 Cal. 2d at 309-10, 163 P.2d at 691. Thus, under *Brooks*, an accident is the efficient  
9 proximate cause of the loss if it (1) is the prime (i.e., predominant) cause, or (2) sets in motion  
10 the chain of events leading to the loss.

11 California courts continue to apply the *Brooks* efficient proximate cause rule in accidental  
12 death and dismemberment cases. In addition to the cases cited in Plaintiff's Opening Brief at pp.  
13 7 - 8, see *Mariscal v. Old Republic Life Ins. Co.*, 42 Cal. App. 4th 1617, 1625-26, 50 Cal.  
14 Rptr.2d 224, 228 (1996); *McMackin v. Great American Reserve Ins. Co.*, 22 Cal. App.3d 428,  
15 439, 99 Cal. Rptr. 227, 234 (1971); *Slobojan, supra*, 70 Cal. 2d at 443, 74 Cal. Rptr. at 902;  
16 *Miller v. United Ins. Co.*, 113 Cal. App.2d 493, 499, 248 P.2d 113, 117 (1952). Federal courts  
17 applying California law in diversity cases also continue to use the *Brooks* efficient proximate  
18 cause rule in accidental death and dismemberment claims. See, e.g., *Khatchatrian v. Continental*  
19 *Casualty Co.*, 198 F. Supp.2d 1157, 1162-63 (C.D. Cal. 2002), *affirmed*, 332 F.3d 1227 (9th Cir.  
20 2003).

21 A review of California accidental death and dismemberment cases shows that the  
22 efficient proximate cause rule imposes a lesser burden on claimants than the predominant cause  
23 test. In *Arata v. California- Western States Life Ins. Co.*, 123 Cal. Rptr. 631, 633-34, 50 Cal.  
24 App. 3d 821, 825 (1975), the insured was a hemophiliac who died from a hemorrhage following  
25 an accidental fall. The insured's pre-existing medical condition, rather than his accident, was the  
26 predominant cause of death: "If the preexisting condition of hemophilia type 8 did not exist, the  
27 accident and the resulting subdural bleeding alone would not have caused the death of the  
28 insured. A person who did not have hemophilia type 8 would not have died from the accident or  
from the subdural bleeding." *Id.*, 123 Cal. Rptr. at 632, 50 Cal. App.3d at 823-24. The *Arata*  
court nevertheless held that the plaintiff was entitled to recover accidental death benefits because



1 the loss was “set in motion” by an accident. *Id.*, 123 Cal. Rptr. at 634, 50 Cal. App.3d at 825.

2 In *Slobojan*, the insured was a police officer who died while chasing a suspect on foot.  
3 74 Cal. Rptr. at 901, 70 Cal.2d at 442. The insured tripped and fell during the chase, and then  
4 collapsed and died of a heart attack. *Id.* Although an autopsy disclosed that the insured suffered  
5 from coronary artery disease, the California Supreme Court upheld a judgment in favor of the  
6 plaintiff because the chase and accidental fall “set the chain of events in motion” that led to  
7 death. 74 Cal. Rptr. at 901 and fn. 2, 70 Cal.2d at 442 and fn. 2.

8 In *Shafer v. American Casualty Co.*, 53 Cal. Rptr. 446, 447, 245 Cal. App.2d 1, 3 (1966),  
9 the insured also suffered from the pre-existing condition of arteriosclerosis and an enlarged heart.  
10 The insured “sustained a bruise on his arm and shock” in an automobile accident. *Id.* Two days  
11 later, he died of a heart attack. *Id.* Although “‘but for’ the decedent’s diseased condition his  
12 death would not have occurred when it did,” the court nevertheless concluded that the accident  
13 was the efficient proximate cause of death. 53 Cal. Rptr. at 451, 245 Cal. App.2d at 10. The  
14 *Shafer* court stated that “the dispositive issue is whether the accident set in progress the chain of  
15 events leading directly to the death. . . .” 53 Cal. Rptr. at 451, 245 Cal. App. 2d at 9.

16 As shown by the *Brooks* line of cases, under California law, an insurer is liable under an  
17 accidental death and dismemberment policy if an accident (1) is the prime cause, *or* (2) sets in  
18 motion the chain of events leading to the loss. The insurer must pay the claim even if an  
19 excluded risk is a “but for” cause of the loss.

20 *Garvey v. State Farm Fire and Casualty Co.*, 257 Cal. Rptr. 292, 296, 48 Cal.3d 395,  
21 403-04 (1989), relied on by Defendant, cites *Brooks* for its application of the efficient proximate  
22 cause rule to a property insurance claim. Defendant is mistaken in asserting that *Garvey* equates  
23 efficient proximate cause with predominant cause. Defs’ Brief at 11:14 - 17. Rather, *Garvey*  
24 states that “efficient proximate cause” is defined “*alternatively* as the ‘one that sets others in  
25 motion,’ and as ‘the predominating or moving efficient cause.’” *Garvey*, 257 Cal. Rptr. at 296,  
26 48 Cal. 3d at 403 (emphasis added; quoting *Sabella v. Wisler*, 27 Cal. Rptr. 689, 59 Cal. 2d 21  
27 (1963)).

28 In *Garvey*, the plaintiffs and the defendant insurer disputed whether the included risk of

1 negligent construction or the excluded risk of earth movement was the efficient proximate cause  
2 of the property loss suffered when a house addition began to pull away from the main structure.  
3 257 Cal. Rptr. at 302, 48 Cal. 3d at 412. The court's focus, not surprisingly, was on the  
4 "predominating cause" prong of the efficient proximate cause rule because the plaintiffs did not  
5 contend that negligent construction set in motion the earth movement of the hillside. *Id.*  
6 Nothing in *Garvey*, however, suggests that the court was overruling *Brooks* or changing its two-  
7 prong test for efficient proximate cause. To the contrary, the *Garvey* court cited *Brooks* as the  
8 basis for its ruling. 257 Cal. Rptr. 292, 296, 48 Cal.3d 395, 403-04.

9 Defendant's assertion that the "efficient proximate cause" rule is equivalent to *McClure's*  
10 "predominant cause" rule misstates the law. The efficient proximate cause rule is the only  
11 causation test properly applicable to Mr. Weis's claim.

12 3. AIG Did Not Apply the "Efficient Proximate Cause" Test or "Predominant  
13 Cause" Tests in Deciding Mr. Weis's Claim.

14 Defendant also argues that in deciding Mr. Weis's claim, AIG applied the "predominant  
15 cause" test without regard to the exclusionary language in the Policy. Def's Brief at 7:18-9:17.  
16 Defendant's claim is demonstrably false. Not only is the "efficient proximate cause" test not the  
17 same as *McClure's* "predominant cause" test, as discussed above, but AIG used a standard that  
18 was more difficult for Mr. Weis to meet than either of these two tests in deciding his claim. AIG  
19 literally applied the exclusionary language in the Policy requiring that a loss result from an  
20 accident "directly and independently of all other causes."

21 The administrative record in this case is full of references to AIG's use of the "directly  
22 and independently" exclusionary language in administering Mr. Weis's claim, despite  
23 Defendant's argument in its Opening Brief. First, as discussed in Plaintiff's Opening Brief, AIG  
24 invoked the exclusionary language in its communications with Dr. Brown, Mr. Weis's treating  
25 physician, and with Dr. Young, the consulting ophthalmologist who reviewed Mr. Weis's claim  
26 for AIG. AIG asked Dr. Brown if Mr. Weis's loss of sight was due to "an accident direct and  
27 independent of all other causes," to which Dr. Brown responded "No." Declaration of Daniel  
28 Feinberg in Support of Motion for Summary Judgment filed 5/23/06 ("First Feinberg Dec."),

1 Exhibit 2 at AR 0211. Given the unenforceability of the exclusionary language, Dr. Brown's  
 2 answer is completely irrelevant to Mr. Weis's entitlement to benefits. Moreover, Dr. Brown  
 3 could have been referring to complications from surgery or a pre-existing partial retinal tear  
 4 completed by the April 8, 2001 accident. AIG nevertheless relied on this irrelevant answer  
 5 repeatedly throughout the claims process, and Defendant continues to cite it even after  
 6 acknowledging the language's inapplicability in its Opening Brief. Def's Brief at 5:26-6:6,  
 7 13:10-17, 14:15-15:8. AIG also referred Dr. Young to the literal language of the Policy in  
 8 requesting his review of Mr. Weis's claim. Second Feinberg Dec., Exhibit 5 at AR 0297.

9 Additional records from AIG's claim review process also indicate that the individuals  
 10 considering Mr. Weis's claim all evaluated it in terms of whether the accident "directly and  
 11 independently of all other causes" resulted in the loss, despite AIG's counsel's advice that the  
 12 exclusionary language was inconspicuous and therefore would not be applied literally by a court.  
 13 Second Feinberg Dec., Exhibit 5 at AR 0243-46.<sup>5</sup> For example, a May 12, 2004 "File Activity  
 14 Sheet" signed by Myra Zimmerman mentions the exclusionary language no less than four times.  
 15 *Id.* at AR 0026-28. And a May 26, 2004 claim review by Ms. Zimmerman also notes "Agree  
 16 with denial loss not direct & independent & caused in whole or in part by, or resulted in whole or  
 17 in part by [sic] sickness, disease." *Id.* at AR 0025.

18 Also, in referring Mr. Weis's appeal to the ERISA Appeals Committee on August 6,  
 19 2004, AIG noted Dr. Brown's response of "No" to the question whether the loss of sight was  
 20 "due to an accident direct and independent of all other causes" (Second Feinberg Dec., Exhibit 5  
 21 at AR 0021), and it exactly quoted one of the Policy's exclusionary phrases, in which it states  
 22 that losses are not covered if "caused in whole or in part by, or resulting in whole or in part from"  
 23 sickness or disease. *Id.* at AR 0022. The ERISA Appeals Committee, therefore, was asked to  
 24 apply literally the policy's exclusionary language.

25 Most significantly, AIG's letters to Mr. Weis denying his claim – both on the original  
 26 claim and on appeal – base their denials on the assertion that Mr. Weis did not sustain a bodily

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27  
 28 <sup>5</sup> In fact, the "directly and independently" exclusionary language was not simply  
 inconspicuous – it has no application here whatsoever. *See* Section III.C.

injury “caused by an accident resulting directly and independently of all other causes.” First Feinberg Dec., Exhibit 2 at AR 041-46. As discussed above, the “efficient proximate cause” test does not contemplate denial of a claim based on contribution of an excluded cause where a covered cause is either (1) the predominant cause of the loss or (2) sets in motion the chain of events leading to the loss. Given AIG’s repeated references to the “directly and independently” language in the Policy, it is clear that it did not apply the “efficient proximate cause” test in deciding Mr. Weis’s claim.

**IV. UNDER ANY STANDARD OF CAUSATION, MR. WEIS IS ENTITLED TO DISMEMBERMENT BENEFITS FOR HIS LOSS OF SIGHT.**

**A. The Accident Was the Efficient Proximate Cause of Mr. Weis’s Loss of Sight.**

As shown in Plaintiff’s Opening Brief, the April 8, 2001 accident in which Mr. Weis jammed his thumb flush into his eye was the efficient proximate cause of his loss of sight in his left eye. The accident set in motion the chain of events that led directly to the loss of sight and/or was the predominant cause of his loss of sight. *See Brooks*, 27 Cal.2d at 309-10, 163 P.2d 689, 691; *Shafer*, 53 Cal. Rptr. at 448-450, 245 Cal. App.2d at 4-7. In its Opening Brief, Defendant does not seriously dispute that Plaintiff prevails under the efficient proximate cause rule, and does not argue with Plaintiff’s explanation that the thumb accident set in motion the chain of events leading directly to his loss of sight. *See generally* Def’s Brief at 9-18.

Mr. Weis is entitled to benefits even if he would not have lost his sight but for his pre-existing condition because the accident set in motion the chain of events leading directly to his loss of sight in his left eye. Mr. Weis accidentally jammed his left thumb flush into his left eye socket. He saw a white flash of light on impact, felt a searing pain, and then the left side of his vision went black. The accident set in motion the following chain of events: (1) emergency appointment with Dr. Brown, who diagnosed elevated pressure and detached retina; (2) eye surgery restoring pre-accident eyesight; and (3) complications from surgery resulting in permanent loss of all vision. Defendant does not attempt to distinguish Mr. Weis’s claim from the holding in *Arata v. California-Western States Life Ins. Co.*, 123 Cal. Rptr. 631, 50 Cal. App. 3d 821, 823-24 (1975) (finding insured entitled to accidental death benefit even though he would

1 not have died from his slip and fall but for his hemophilia).

2 Defendant's only attempt to argue that Mr. Weis should not prevail under the efficient  
3 proximate cause test is a reference to one absurd comment by Dr. Young that the thumb-jabbing  
4 accident had "no causal effect" on Mr. Weis's loss of sight. Def's Brief at 12:4-5. As discussed  
5 in Plaintiff's Opening Brief, it defies common sense for Defendant to claim that Mr. Weis's  
6 violent accident on April 8, 2001, in which he jammed his thumb "several inches into his eye  
7 socket," Joint Case Management Statement ("JCMS") at 2:12, caused no injury to his eye. *See*  
8 Plaintiff's Opening Brief at 9:17-10:5.

9 1. Mr. Weis Had Vision in his Left Eye Before the Accident.

10 Even assuming Dr. Young is correct that Mr. Weis's retina was damaged prior to his  
11 violent accident, the conclusion does not follow that he had already lost all vision in his left eye.  
12 Mr. Weis has never argued that his left eye was a model of healthy function prior to the accident:  
13 it is undisputed that his left-eye vision prior to the accident was 20/400 or Counting Fingers at 3  
14 Feet. JCMS at 2:18-20. However, limited vision – even legal blindness – is not the same as total  
15 blindness. The Policy insures only against *total* loss of vision in an eye, POL 011, not legal  
16 blindness. There is no evidence that Mr. Weis had lost *all* vision in his left eye prior to the  
17 accident. In fact, it is a stipulated fact that Mr. Weis had vision in his left eye prior to the  
18 accident and lost all vision immediately following. JCMS 2:19-21. The loss became permanent  
19 only following complications from surgery. *Id.* at 2:24-26. It goes against common sense to  
20 suggest that such a violent accident did not contribute to Mr. Weis's retinal detachment, elevated  
21 eye pressure, and need for surgery, which led to his permanent loss of sight. Therefore,  
22 Defendant's assertion that Mr. Weis's loss of vision occurred prior to the accident on April 8,  
23 2001, is illogical and contrary to both Policy terms and the stipulated facts.

24 2. AIG's Claim Denial Was Based on Unreliable Evidence.

25 Defendant fails in its attempt to show that the evidence cited in its claim denial is reliable,  
26 *see* Def's Brief at 11:25-12:17. Defendant does not dispute that AIG asked Dr. Young and Dr.  
27 Brown to use the wrong standard of causation in evaluating Mr. Weis's claim. *See id.*, P's  
28 Opening Brief at 12:1-13:11, Section III.C.3 above. This fact alone renders useless all of the

1 physicians' statements that the accident was not the cause of the loss in evaluating whether the  
2 accident was the *efficient proximate cause* of the loss.

3 Further, Dr. Young's second-hand statement of Dr. Brown's opinion is unreliable.  
4 Defendant argues that "no evidence" shows that the information in Dr. Young's hearsay report is  
5 unreliable. Def's Brief at 13:6. Hearsay, however, is excluded from evidence when not subject  
6 to an exception because it is viewed as inherently unreliable. *See* P's Opening Brief at 12:7-24.  
7 Also, there is reason to doubt the accuracy or completeness of Dr. Young's hearsay statement of  
8 Dr. Brown's opinion. First, Dr. Young's account of Dr. Brown's supposed statement that Mr.  
9 Weis's "advanced detachment with massive fibrovascular proliferation" could not have been the  
10 result of the April 2001 accident directly contradicts Dr. Brown's first-person statement that the  
11 majority of the evidence indicated Mr. Weis's retinal detachment was not related to his previous  
12 condition. First Feinberg Dec., Exhibit 2 at AR 0161-62. Given this apparent contradiction, it is  
13 "difficult to understand why [AIG] would not obtain an official opinion in writing" to clarify Dr.  
14 Brown's opinion. *See Blankenship v. Liberty Life Assur. Co.*, 2004 WL 1878211 (N.D. Cal.  
15 2004) at \*10.

16 Second, Dr. Young's statement of Dr. Brown's supposed opinion echoes almost exactly  
17 Dr. Young's own statement from his original review of Mr. Weis's claim. On April 2, 2004, Dr.  
18 Young, in asserting in his initial report to AIG that the April 8, 2001 injury was not the cause of  
19 the detachment, speculated: "More likely it brought Mr. Weis' attention to the fact that the  
20 vision of the left eye had changed." Second Feinberg Dec., Exhibit 5 at AR 0262. In his July 2,  
21 2004 report regarding Mr. Weis's appeal, Dr. Young claimed that Dr. Brown stated that "more  
22 than likely, the poke in the eye incident brought Mr. Weiss' [sic] attention to the fact that the  
23 vision had changed in the left eye." First Feinberg Dec., Exhibit 2 at AR 0155. The remarkable  
24 similarity in the phrasing of these two items suggests that Dr. Young's summary of his  
25 conversation with Dr. Brown may have been altered, consciously or unconsciously, to mesh with  
26 his own previous opinion.

27 These same facts also show that Defendant is wrong in asserting that Dr. Brown "flip-  
28 flopped between saying that the poke in the eye was not, then was, and then again was not the

1 cause of Weis's 'advanced detachment with massive fibrovascular proliferation.'" Def's Brief at  
 2 13:12-14. First, Dr. Brown's first statement (answering "No" to the question whether the loss  
 3 was "due to an accident direct and independent of all other causes" (First Feinberg Dec., Exhibit  
 4 2 at AR 0211)) does not reflect Dr. Brown's opinion as to whether the accident was the efficient  
 5 proximate cause or predominant cause of Mr. Weis's loss of vision. Since AIG did not ask Dr.  
 6 Brown to explain his answer, he did not elucidate what other causes contributed to Mr. Weis's  
 7 loss of sight. *Id.* Thus, Dr. Brown did not state whether complications from surgery, Mr. Weis's  
 8 pre-existing eye problems, or some other cause contributed to the loss of sight. Dr. Brown's  
 9 second opinion explained how Mr. Weis's loss occurred and stated his opinion that the accident,  
 10 via surgery, caused the loss of sight. *Id.* at AR 0161-62. Dr. Brown's purported third statement,  
 11 as expressed by Dr. Young, was likely mischaracterized as discussed above, and in any event was  
 12 also subject to the same misunderstanding of the standard of causation as his first statement.

13 In addition, Defendant's citation to Fed. R. Evid. 703, and cases applying it, for the  
 14 proposition that Dr. Young "may base his opinion" on Dr. Brown's statement – the authenticity  
 15 of which is suspect – is completely inapposite. *See* Def's Brief at 12:11-12:3. Rule 703 governs  
 16 admissibility of testimony of testifying experts. Admissibility of Dr. Young's testimony is not at  
 17 issue here: his statements are (a) not testimony, and (b) already in evidence by virtue of their  
 18 inclusion in the claim's administrative record. Rules governing whether a trier of fact should  
 19 hear an expert's opinion have no bearing here, where the issue whether the Court will choose to  
 20 believe Dr. Young's hearsay summary of a telephone conversation with Dr. Brown that was not  
 21 transcribed, recorded, or confirmed in writing.

22 Because the facts indisputably show that the April 8, 2001, accident was the efficient  
 23 proximate cause of Mr. Weis's total loss of sight in his left eye, he is entitled to benefits under  
 24 the terms of the Plan.

#### 25 **B. The Accident Was Also the Predominant Cause of Mr. Weis's Loss of Sight.**

26 Even if Defendant were correct that *McClure's* "predominant cause" test applies to Mr.  
 27 Weis's claim, Plaintiff still prevails because the April 8, 2001 accident was the predominant  
 28 cause of his loss of sight in his left eye.



1 It is undisputed in this case that Mr. Weis had vision in his left eye immediately prior to  
2 the April 2001 accident. The parties stipulated that after Mr. Weis jammed his thumb “several  
3 inches into the eye socket,” JCMS 2:12, he saw a flash of light, and then “the left side of his  
4 vision went black.” *Id.* at 2:13. For the left side of his vision to have gone black, Mr. Weis  
5 obviously had to have vision in the eye prior to the accident. The parties further stipulated that  
6 “prior to the April 8, 2001 accident and subsequent surgery, Mr. Weis’s vision in his left eye was  
7 20/400 or “counting fingers at three feet.” JCMS 2:19-21. It is further undisputed that  
8 “[i]mmediately following the accident . . . , Mr. Weis had no vision in his left eye.” *Id.* at 2:20-  
9 22. Mr. Weis’s vision returned for a short time after surgery, but following complications  
10 including pressure fluctuations and clouding of the cornea, he has lost all vision in the left eye.  
11 *Id.* at 2:21-26. As discussed above, Defendant’s belated suggestion that he had already lost total  
12 vision in his left eye before his violent accident is speculation contrary to stipulated facts, the  
13 medical records, and to common sense.

14 Given these undisputed facts, it is impossible for Defendant to argue that the violent April  
15 2001 accident, in which Mr. Weis jammed his entire thumb into his eye, was not the predominant  
16 cause of his total loss of sight. Had Mr. Weis not experienced such a violent accident, the  
17 pressure in his eye would not have been so high, the surgery would not have been so complex,  
18 and the resulting complications which led to his total loss of sight would not have ensued. *See*  
19 *McClure*, 84 F.3d at 1133 (loss resulting from “process of nature” relates back to original  
20 accident). There is absolutely no evidence that Mr. Weis’s total loss of sight would have  
21 occurred in the absence of the accident.

22 Even if Mr. Weis had a pre-existing tear in the retina, it was still the accident that finished  
23 the damage to the eye and led to the total loss of all vision. Retinal tears do not always instantly  
24 result in a total loss of vision. In *Williams v. Hartford Accident and Indemnity Co.*, 204 Cal.  
25 Rptr. 453, 158 Cal. App. 3d 229 (1984), the insured had a pre-existing partially torn retina,  
26 causing minor obstruction in his field of vision. He then aggravated the tear by jogging, causing  
27 further retinal tears which worsened his vision, leading to surgery. The surgery eventually  
28 resulted in hemorrhaging and the total loss of sight in the injured eye. *Williams*, 158 Cal. App.



3d at 231. The court upheld the denial of the claim – not because the insured had a pre-existing retinal tear prior to the jog – but only because the insured’s act of jogging did not constitute an accident. *Id.* at 234-35. The court noted that there was nothing extraordinary about the insured’s jog other than its result: there was no evidence of “falling, slipping, overexertion, or of any external force striking the body of the appellant.” *Id.* at 234, citing *Alessandro v. Massachusetts Cas. Ins. Co.*, 42 Cal.Rptr. 630, 232 Cal.App.2d 203, 207 (1965).

Mr. Weis’s case is distinguishable from *Williams* by the occurrence of a serious accident – Mr. Weis fell and jammed his entire thumb into his eye. It is clear from the rationale of *Williams* that the existence of a pre-existing retinal tear does not prevent a vision loss from being covered by an accidental death and dismemberment plan where vision remained in the eye before the accident. Even if Mr. Weis had a pre-existing partial retinal detachment (a fact which is much in dispute, *see* Section IV.A above), the accident would have worsened the detachment, caused elevated eye pressure, and led him to have surgery. Therefore, the accident was still the predominant cause of his loss.

Defendant’s arguments defending its decision to deny Mr. Weis’s claim all fail for the reasons already discussed above in Section IV.A in relation to the efficient proximate cause standard.

## **V. CONCLUSION.**

The total loss of vision in one eye is a major loss, even when the eye previously had only limited vision. Even an eye with limited vision, like Mr. Weis’s left eye, provides stereo vision, which is crucial to our visual interaction with the world because it is the only way we can perceive three-dimensional depth. Famed neurologist Oliver Sacks recently wrote that the loss of stereo vision can have a profound negative effect on a person’s perception of his or her surroundings – “the only way to actually *perceive* depth rather than judge it is with binocular stereoscopy.” Oliver Sacks, *Stereo Sue*, THE NEW YORKER, June 19, 2006, at 64, 66. Stereoscopy makes the difference between snow appearing “to fall in a flat sheet” and feeling oneself “within the snowfall.” *Id.* at 73. In fact, “[s]ome people, losing binocular vision for a long period, find the experience very disturbing” and have difficulty recognizing familiar objects.

1 *Id.* at 66. Mr. Weis's left eye provided him with depth perception prior to his April 2001  
2 accident, but the accident and subsequent surgery robbed him of that vision, and Mr. Weis has  
3 thus been "reduced to a two-dimensional world." *See id.* at 66.

4 The facts demonstrate that under the terms of the Plan and applicable law, Mr. Weis is  
5 entitled to benefits for that loss. He requests that the Court grant his motion for summary  
6 judgment and deny Defendant's cross-motion.

7  
8 Dated: June 20, 2006

Respectfully submitted,

9 LEWIS, FEINBERG,  
10 RENAKER & JACKSON, P.C.

11 By: /s/  
12 Daniel M. Feinberg  
13 Attorneys for Plaintiff

14 [S:\Cases\Weis, R 0456\Motions\SJ opp and reply.mwg.wpd]  
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